

**BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF OREGON
for the
OREGON FISH AND WILDLIFE COMMISSIONS**

**IN THE MATTER OF
DENNIS LEE STURGELL**

**RESPONDENT STURGELL'S
RESPONSE TO ALJ'S PROPOSED
ORDER AND ODFW'S EXCEPTION
TO ALJ'S PROPOSED ORDER**

OAH Case No. 901273
Agency Case No.: 909Sturgell

Respondent Sturgell does not object to the Administrative Law Judge's Order and has no significant exceptions to it.

ODFW is correct that, strictly speaking, the Commission's revocation authority is limited to the license year. Therefore, again strictly speaking, the ALJ's Proposed Order should have recited that she recommended a total six-month sanction, including revocation through December 31, 2009 and a bar on re-application until February 4, 2010.

Contrary to the Department's position, "the ALJ's Proposed Order does not 'send the wrong message,'" it sends, and has already sent, an extremely expensive and hard, serious message to not only the Respondent, but because of its unprecedented action and the Respondent's notoriety, to Oregon's entire commercial fisheries fleet as a whole.

This is especially true when one recognizes, as the testimony at the hearing reflected, that, as a practical matter, barring the Respondent from participation in the 2009-10 Oregon Ocean Dungeness crab fishery until early February 2010, thereby depriving him of participation during the first two months of the season, has resulted in a penalty of several hundred thousand

dollars, since the Respondent is historically one of the most successful participants in the crab fishery (and this year promises to be a record year), and the vast majority of the fishery takes place within the first two months of the season.

ODFW, unlike the ALJ, also fails to appreciate the significance of the sanctions to which the Respondent has already been subjected, including a 30-day jail sentence. In addition, the penalty that the Respondent has paid in is far in excess of the penalty imposed upon Mr. Kanury, despite the fact that Mr. Kanury's offenses were much more serious.

The Department also ignores that the fact that this is the first revocation action taken by the Department in over 30 years. How can the Department say, in good faith, that if the ALJ's Proposed Order is accepted, "the wrong message has been sent"? What evidence is there of that? Has the Respondent, or any other licensed commercial fisher in Oregon for that matter, done or said anything that would even suggest that a six-month revocation instead of a one-year revocation would be viewed as ineffectual or inconsequential, lacking in deterrent effect? Of course not.

The reality is that Respondent Dennis Sturgell has been targeted by the ODFW for enforcement actions, as Mr. Toste's testimony at the hearing made clear. He has paid a huge price for that. The ALJ's Proposed Order reducing the revocation and non-renewal period to six months instead of one year is frankly a much-needed corrective to what was an inordinately and disproportionate response to the Respondent's offenses, particularly given the nature of the violation and the penalties already imposed him.

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CONCLUSION

The Respondent urges the Commission to uphold the ALJ's Proposed Order and allow him to re-apply for his commercial fishing license and Ocean Dungeness crab permit effective February 4, 2010.

DATED this 1st day of February, 2010.

LANDYE BENNETT BLUMSTEIN LLP

By: 

Thane W. Pienson, P.C., OSB 773741
Of Attorneys for Respondent Sturgell

CERTIFICATE OF SERVICE

I hereby certify that on February 1, 2010, I served the foregoing **RESPONDENT'S RESPONSE TO ALJ'S PROPOSED ORDER AND ODFW'S EXCEPTION TO ALJ'S PROPOSED ORDER** on the following individuals

Administrative Law Judge Alison Greene Webster
Office of Administrative Hearings
7995 SW Mohawk St.
Tualatin, OR 97062
(1-503-612-4340)(fax))

via fax; and to:

William Cook
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LANDYE BENNETT BLUMSTEIN LLP

By: 

Jerry G. Zwick, Legal Asst. to Thane W. Tienson, P.C.
Of Attorneys for Respondent Sturgell

JOHN R. KROGER
Attorney General



MARY H. WILLIAMS
Deputy Attorney General

DEPARTMENT OF JUSTICE
GENERAL COUNSEL DIVISION

February 1, 2010

Oregon Fish and Wildlife Commission
c/o Teri Kucera
Dept of Fish & Wildlife
3406 Cherry Ave NE
Salem, OR 97303

Re: Dennis Sturgell Contested Case Hearing
DOJ 635020/GN0413-09
OAH Case No. 901273

Dear ODFW Commission:

Enclosed for filing is ODFW's Exceptions to ALJ's Proposed Order. Thank you for your consideration.

Sincerely,

A handwritten signature in cursive script that reads "William R. Cook".

William R. Cook
Assistant Attorney General
Natural Resources Section

WRC:lal/1716793-v3

Enclosures

cc: Thane Tienson, Esq.
DeAnna Erickson, Steve Williams, ODFW

1 **BEFORE THE OREGON FISH AND WILDLIFE COMMISSION**

2
3 In the matter of

4 **DENNIS LEE STURGELL**

**ODFW'S EXCEPTIONS TO
ALJ'S PROPOSED ORDER**

OAH Case No. 901273

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7 To ensure that the Commission has the benefit of a record that is as complete and clear as
8 possible, the Oregon Department of Fish and Wildlife respectfully offers the following
9 exceptions to Administrative Law Judge Webster's Proposed Order.

10 **Respective roles of Department and Commission.** The respective roles of the
11 Department and Commission should be clarified. The *Department* issued the Notice of Intent to
12 Revoke and prosecuted this case through the hearing process. However, the *Commission* is the
13 final decision-maker.

14 **Violation history.** OAR 635-006-0235(7) provides that in deciding whether to revoke or
15 refuse to issue a license or permit, the Commission will consider (among other things):

- 16 • the gravity of the most recent offense, including whether the offense was a felony and
17 whether the offense involved a closed season, closed area, or unlawful gear;
- 18 • the gravity of the other commercial fishing offenses of which the person has been
19 convicted or forfeited bail;
- 20 • the impact of the offense on the fisheries resources of the state or, where relevant, on
21 the State of Washington, including consideration of the species involved;
- 22 • whether the person also has been convicted of or forfeited bail for violations of the
23 Wildlife laws of the State of Oregon.

24 **Adequacy of the findings.** The Proposed Order includes findings of fact responding to
25 these requirements. However, those findings do not reflect enough of the details that were
26 provided at the hearing. The record includes hours of sworn testimony on these issues from two

1 members of the Oregon State Police and from the Department's license services manager, as
2 well as voluminous exhibits from Oregon State Police investigative reports and from the circuit
3 courts of Tillamook and Clatsop County. Because of the extent of the record, the Proposed
4 Order should have provided more of the details of those offenses for the Commission's
5 consideration, especially concerning the precise nature of the:

- 6 • 2009 Tillamook County crab pot tag violations;
- 7 • 2009 Clatsop County black cod logbook and overage violations;
- 8 • Washington fishery violations; and
- 9 • Federal fishery violations.

10 To ensure compliance with the requirements of the rule, the Department urges the
11 Commission to review the hearing transcript and exhibits for these details.

12 Characterization of violation history. At page 2 in Finding of Fact number 1, the
13 Proposed Order suggests that Mr. Sturgell "has occasionally been convicted of violations of the
14 commercial fishing laws in Oregon and Washington." On page 7 in the Opinion section, the
15 Proposed Order then suggests that Mr. Sturgell has "in his 45-year commercial fishing career,
16 been convicted of a handful of other commercial fishing offenses...." Instead of using subjective
17 terms to characterize Mr. Sturgell's violation history, the Proposed Order should have used the
18 actual total number of violations and let the Commission draw its own conclusions.

19 Policies behind the requirements Mr. Sturgell violated. The Proposed Order failed to
20 note Steve Williams' testimony concerning the important public policies behind the crab pot tag
21 requirements (equitable allocation of a public resource among the fishing fleet) and black cod
22 logbook and overage requirements (conservation of the fishery resource).

23 Revocation and reapplication periods. The Proposed Order upholds the
24 Commission's authority to revoke Mr. Sturgell's commercial fishing license and his Ocean
25 Dungeness Crab permit, and to then refuse to reissue them for a period of time. However, the
26 Proposed Order recommends that the Commission exercise that authority differently than set

1 forth in the May 4, 2009 Final Order. The Department respectfully submits that this difference
2 arises from two sources: first, a misunderstanding of the law concerning the timing of those
3 periods; and second, a failure to consider the broader policy implications.

4 Timing. This case involves two different powers wielded by the Commission, each
5 subject to different timing under technical legal provisions. The first power is the power to
6 revoke a commercial fishing license or permit. ORS 508.485(1) says that such revocation takes
7 the license or permit away "for the remainder of the license year." Commercial fishing licenses
8 and permits are issued for the calendar year. The second power is the power to refuse to reissue
9 the license or permit. Because revocation takes away the current license or permit for the
10 remainder of the year, refusal to renew is relevant only after the start of the following year.
11 However, for whatever reason the statute says that the "refusal to reissue period" is calculated
12 "from the date of the license revocation order."

13 Unfortunately, the Proposed Order recommends that the Commission revoke Mr.
14 Sturgell's license for six months past the August 4, 2009 Final Order date (which would extend
15 the revocation more than a month past the permit expiration date of December 31, 2009). As
16 noted above, revocation authority is effective only "through the remainder of the license year."

17 Policy. The Final Order took away Mr. Sturgell's license and permit for the rest of the
18 2009 season, and prevents him from reapplying until August 4, 2009. By contrast, the Proposed
19 Order recommends scaling back those sanctions by six months, allowing Mr. Sturgell to reapply
20 February 4, 2010. The Department urges upholding the Commission's original decision.

21 Although the Proposed Order does not mention it, Steve Williams testified under oath
22 that the Commission's 2009 revocation actions against Perry Kanury and Mr. Sturgell are just
23 the beginning of an effort to deliver a stronger message to the commercial fishing community.
24 While in the past the Department and Commission have not often sought to revoke commercial
25 fishing licenses or permits, it has become clear that the time has come to include revocation as an
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1 important part of the State of Oregon's enforcement strategy. Scaling back the sanctions in this
2 case would send the wrong message just as this new enforcement tool was being implemented.

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4 DATED this 1st day of February 2010.

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Respectfully submitted,

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JOHN R. KROGER
Attorney General

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William R. Cook

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William R. Cook, #822252
Senior Assistant Attorney General
Of Attorneys for Oregon Department of Fish
and Wildlife

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CERTIFICATE OF SERVICE

I certify that on February 1, 2010, I served the foregoing ODFW'S EXCEPTIONS TO ALJ'S PROPOSED ORDER upon the parties hereto by emailing and mailing, regular mail, postage prepaid, a true, exact and full copy thereof to:

Oregon Fish and Wildlife Commission
c/o Teri Kucera
Dept of Fish & Wildlife
3406 Cherry Ave NE
Salem, OR 97303
email: teri.kucera@state.or.us

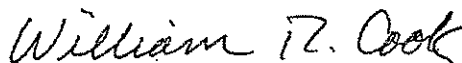
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I certify that on February 1, 2010, I served the foregoing ODFW'S EXCEPTIONS TO ALJ'S PROPOSED ORDER upon the parties hereto by mailing, regular mail, postage prepaid, a true, exact and full copy thereof to:

Eugene Law
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